UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff, - v.- UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	**ECF CASE** 05 Civ. 5468 (JSR)

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DOD[1] respectfully submits this reply memorandum of law in further support of its motion for summary judgment and in opposition to AP's cross-motion. For the reasons set forth below, and in DOD's moving papers, DOD conducted a reasonable search for documents responsive to AP's FOIA requests and properly withheld the information at issue under Exemptions 5, 6, and 7(C) of FOIA. In addition, after the filing of DOD's initial brief on February 22, 2006, and DOD's production of CSRT documents on March 3, 2006, the International Committee of the Red Cross ("ICRC") formally requested that DOD refrain from publicly releasing correspondence between detainees and their families, known as "Red Cross Messages." Accordingly, based upon the ICRC's request, DOD invokes Exemption 3 of FOIA, 5 U.S.C. § 553(b)(3), as an additional basis for withholding the correspondence submitted by two detainees to the ARBs. See Point III.A, infra.

POINT I

DOD'S SEARCH WAS REASONABLE

AP claims for the first time in its brief that DOD unreasonably failed to search for transfer and release documents that were generated outside the ARB process. Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment ("Opp.") at 8. As set forth below, DOD reasonably interpreted AP's January 18, 2005 FOIA request as calling for transfer and release documents only within the context of the ARBs.

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[1] All abbreviations used in Defendant's Memorandum of Law In Support of Its Motion for Summary Judgment ("Mem.") are incorporated herein.

As a threshold matter, DOD's interpretation was reasonable given the structure and wording of the request. The first category of documents sought in AP's January 18, 2005 request was expressly limited to the ARB process, seeking transcripts of all testimony given at the ARBs since they began in December 2004. See Normand Decl., Exh. A at Exh. B. The following four categories also appeared to seek documents relating to the ARBs, namely, written statements provided by detainees, documents provided by detainees to their "personal representatives," affidavits submitted by witnesses to the ARBs, and allegations against detainees, as well as details and explanations of the decisions to release or transfer detainees. See id. The request was also addressed to (in addition to DOD's general FOIA officer) Rear Admiral James McGarrah, the head of OARDEC, the office responsible for conducting the ARBs. Hecker Decl. ¶ 3a; Supplemental Declaration of Karen L. Hecker dated March 13, 2006 ("Supp. Hecker Decl.") ¶ 13.[2]

Contrary to the suggestion in its brief, AP did not request "documents concerning any 'decision to release or transfer detainees,'" Opp. at 8 (emphasis added); rather, it referred to "the decisions made to release or transfer detainees," which, read in context with the other categories of documents requested and the reference to Rear Admiral McGarrah, indicated that the request applied only to ARB documents. Although this category of documents was not expressly limited to ARB proceedings, neither were the categories relating to written statements provided by detainees, documents provided by detainees to personal representatives, or copies of allegations against detainees. AP, notably, does not contend that these other categories concerned non-ARB

[2] By contrast, AP's November 16, 2004 FOIA request for documents regarding alleged detainee abuse was directed to the Deputy Assistant Secretary of Defense for Detainee Affairs. Normand Decl., Exh. A at Exh. A.

documents.

AP's conduct in this litigation, moreover, confirms that DOD reasonably interpreted the January 18, 2005 FOIA request as limited to documents generated during the ARB process. AP's complaint described the ARB proceedings in some detail, see Normand Decl., Exh. A ¶¶ 2, 13, 15, and nowhere suggested that it sought transfer or release documents unrelated to the ARBs, even though DOD's public website contained documents and information indicating that numerous detainees had been transferred from Guantanamo before the ARBs began in December 2004, Supp. Hecker Decl. ¶ 9 & Exhs. F-G. The parties' Stipulation and Order, which clarified the scope of certain requests, further evidenced the parties' understanding that the January 18, 2005 request concerned ARB documents, even as to categories of documents that were not expressly limited to ARBs. See Normand Decl., Exh. B ¶ i (clarifying that DOD would interpret request for documents provided by detainees to personal representatives as seeking documents provided to Assisting Military Officers, who assist detainees at ARB proceedings), ¶ k (providing that DOD would respond to request for "the allegations against the detainees" by providing statements provided to each detainee who was subject to an ARB).

Further, upon DOD's production of documents responsive to AP's January 18, 2005 request – documents that on their face were limited to the ARBs, see Hecker Decl. ¶ 5; Declaration of Adam J. Rappaport dated March 3, 2006 ("Rappaport Decl."), Exh. F – AP failed to advise DOD at any time that its request for transfer and release documents was in fact not limited to the ARBs, although AP sought clarification of other aspects of DOD's production. Supplemental Declaration of Sarah S. Normand ("Supp. Normand Decl.") ¶ 3 & Exhs. A-C. Aware that DOD interpreted its January 18, 2005 FOIA request as a request for ARB documents, AP had ample opportunity to clarify the scope of that request but never suggested (until now) that DOD should have searched for or provided transfer and release documents generated outside of the ARB process. This Court should therefore reject AP's newly expanded interpretation of its FOIA request and hold that DOD's search was reasonable.

POINT II

DOD HAS PROPERLY WITHHELD DETAINEE IDENTIFYING INFORMATION FROM THE DOCUMENTS RELATING TO ALLEGED DETAINEE ABUSE PURSUANT TO FOIA EXEMPTIONS 6 AND 7(C)

AP does not dispute that the information withheld from the documents concerning alleged abuse of detainees was "compiled for law enforcement purposes," 5 U.S.C. § 552(b)(7), and constitutes "medical files and similar files," id. § 552(b)(6). Accordingly, there is no dispute that the information at issue is subject to Exemptions 6 and 7(C). Although the Court employs a balancing test under both exemptions, Exemption 7(C) is more protective of privacy interests. U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 763 n.13 (1989); see 5 U.S.C. § 552(b)(7)(C) (records exempt where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy").

A. The Detainees Have Cognizable Privacy Interests Under FOIA

AP does not contest that victims of crime or abuse have a privacy interest in not being exposed to public scrutiny; AP simply claims that this well-established principle does not apply to prisoners because they purportedly do not have a reasonable expectation of privacy in their interactions with prison officials. See Opp. at 12-15 & n.3. AP fundamentally misunderstands the scope of the privacy interests protected by FOIA and misinterprets this Court's earlier ruling in the CSRT case.

As a threshold matter, as DOD noted in its opening brief, Mem. at 24, the Supreme Court has repeatedly cautioned that the privacy interest protected under FOIA is not the same as, and is in fact broader than, the privacy interest protected under the Fourth Amendment. See National Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004) ("We have observed that the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution." (citing Reporters Comm., 489 U.S. at 763 n.13)). AP's reliance upon Fourth Amendment case law to argue that prisoners have no reasonable expectation of privacy, Opp. at 12-13, is therefore misplaced. Indeed, the District of Columbia Circuit has rejected the very argument advanced by AP here. In Judicial Watch, Inc. v. Department of Justice, 365 F.3d 1108, 1124-26 (D.C. Cir. 2004), the plaintiff sought a variety of personal information about pardon applicants, citing case law holding that prison inmates have no reasonable expectation of privacy under the Fourth Amendment. The court observed:

> Judicial watch's reliance on such cases as United States v. Amen, 831 F.2d 373 (2d Cir. 1987), for the proposition that pardon applicants do not have the same privacy interests as law-abiding citizens, is misplaced. Amen involved a Fourth Amendment claim where the Second Circuit held that prison inmates have no reasonable expectation of privacy – i.e., they are subject to strip searches, random cell searches, and monitoring of telephone conversations. 831 F.2d at 379-80 (citations omitted). It does not follow that pardon applicants, who are not necessarily [but may well be] still in custody, do not have a privacy interest in documents containing sensitive information.

365 F.3d at 1126. The Fourth Amendment cases cited by AP, Opp. at 13, are equally inapposite here.

Moreover, AP's contention that "[i]t is hard to imagine that a detainee would have any expectation of privacy in his interactions with DOD personnel while imprisoned at Guantanamo," Opp. at 12, proves too much. Under AP's reasoning, prisoners or inmates would have no privacy interest in their personal information simply because they are within the Government's custody and control. But there is no support for such a blanket rule. To the contrary, courts have recognized that prisoners and inmates retain privacy interests in their personal information notwithstanding their confinement. See, e.g., Harbolt v. Dep't of State, 616 F.2d 772, 774 (5th Cir. 1980) (finding that U.S. citizens imprisoned in foreign countries had privacy interests in avoiding disclosure of their names and places of residence in the United States, and noting that "[n]othing could be more personal than an individual's name and home address, when linked with the stigma of incarceration abroad"); Ledesma v. U.S. Marshal's Svc., No. Civ. A. 04-1413 (JDB), 2005 WL 405452, at *4 (D.D.C. Feb. 18, 2005) (noting that "the names and identities of individuals of investigatory interest to law enforcement and those merely mentioned in law enforcement files have been consistently protected from disclosure," and holding that name and prison number of inmate in Marshal's custody properly withheld under Exemption 7(C)); Brady-Lunny v. Massey, 185 F. Supp. 2d 928, 932 (C.D. Ill. 2002) (finding that "providing a list of inmates' names . . . would be an unreasonable invasion of privacy," and that "any watchdog function that disclosure would serve . . . is clearly outweighed by [the] inmates' privacy interests"); cf. also ACLU v. Dep't of Defense, 389 F. Supp. 2d 547, 572 (S.D.N.Y. 2005) (ordering disclosure of redacted versions of so-called "Darby photographs" of detainees at Abu Ghraib, but noting that as to certain photos and one video, "where the context compelled the conclusion that individual recognition could not be prevented without redaction so extensive as to render the images meaningless, [the court] ordered those images not to be produced"), appeal pending, 05-6286-cv (2d Cir.).[3]

Further, this Court did not rule in the CSRT case, as AP appears to contend, see Opp. at 12-15, that in order to establish a privacy interest under FOIA, DOD must show that the detainees had an actual, reasonable expectation of privacy at Guantanamo. Rather, the Court concluded that due to the "quasi-judicial" nature of the CSRT proceedings, including the presence of the equivalent of a court reporter and members of the press, the detainees could not have had a reasonable expectation that their identities would not be publicly revealed. See January 23 Opinion at 10-12. That the detainees may have expected their identities to be revealed to DOD or other U.S. Government personnel as a result of the allegations of abuse does not suggest any expectation that this information would be disclosed to the world at large. As the Supreme Court has recognized, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Reporters Comm., 489 U.S. at 770 (citation and internal quotation marks omitted) (criminal rap sheets properly withheld under Exemption 7(C)); see also Department of the Air Force v. Rose, 425 U.S. 352, 380-81 (1976) (identifying details contained in disciplinary records properly withheld under Exemption 6 even though they had previously been disseminated on bulletin boards throughout Air Force Academy).

Thus, the Court's prior determination that the CSRT proceedings constituted "quasi-judicial" proceedings, January 23 Opinion at 10-12, was central to its conclusion that the

[3] On appeal, the ACLU does not challenge Judge Hellerstein's determination that certain photographs and one video were properly withheld under Exemptions 6 and 7(C) because the detainees' identities could not be meaningfully redacted. The Second Circuit has scheduled oral argument in this appeal for April 7, 2006.

detainees had no reasonable expectation of privacy in their identifying information.[4] Accordingly, it would not be "incongruous," Opp. at 12, notwithstanding the Court's earlier ruling in the CSRT case, for the Court to determine in this case that the detainees could have a reasonable expectation that information about alleged abuse would not be publicly disclosed, where none of the indicia of a "quasi-judicial" proceeding are present, and there is no reason to believe that the detainees even know that the abuse documents exist or that their identifying information is contained therein. See Mem. at 24-25. Contrary to AP's claim, Opp. at 13, the fact that some detainees have publicized allegations of abuse, whether upon release or through their habeas counsel, does not show that the detainees as a group could have no expectation or desire to avoid public disclosure of their identities in the context of the allegations of abuse. It only shows that the detainees have the ability to self-identify if they wish to do so.[5]

AP's argument that the detainees are "third parties vis-a-vis the disciplinary records," Opp. at 14, is also unavailing. Third parties whose names are mentioned in law enforcement records have compelling privacy interests in avoiding public disclosure of their identities. See, e.g., Perlman v. U.S. Dep't of Justice, 312 F.3d 100, 106 (2d Cir. 2002) (witnesses and third parties identified as part of law enforcement investigation "possess strong privacy interests").[6] Moreover, as to the detainees accused of wrongdoing, Opp. at 15, the Second Circuit has suggested that third parties who are subjects of investigation have even greater privacy interests than law enforcement personnel. Halpern v. FBI, 181 F.3d 279, 297 (2d Cir. 1999); see also January 23 Opinion at 12 n.5 (noting that government investigators have "a well-recognized expectation of privacy").

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[4] Further, the Court left open the possibility that DOD could make a particularized showing of a privacy interest as to particular documents or information. See January 4 Opinion at 6 n.3. If AP were correct that detainees at Guantanamo have no privacy interests whatsoever, then there would be no point in making such a showing.

[5] The Court should reject AP's suggestion that DOD again be required to poll the detainees, Opp. at 17 n.7, for all of the reasons stated in DOD's prior submissions regarding polling, which are incorporated by reference herein. DOD likewise opposes polling with regard to Red Cross Messages. See Supp. Hecker Decl., Exh. A; Point III.A, infra.

B. The Detainees' Privacy Interests Outweigh Any Public Interest in Disclosure

AP does not dispute that DOD has made available substantial information regarding alleged detainee abuse at Guantanamo, both in response to AP's FOIA request and outside the FOIA context. Mem. at 25-27. The only public interest advanced by AP is the purported interest in contacting the detainees for the purpose of obtaining and reporting their "side of the story." Opp. at 16-17. As the Supreme Court has recognized, however, a news organization's desire to obtain information for use in news-gathering is not the sort of public interest that FOIA protects. Reporters Comm., 489 U.S. at 774-75. In any event, it is not clear that disclosure of the detainees' identities would yield the information that AP seeks. AP incorrectly asserts that if the Court orders release of the identifying information, "if the alleged victim of abuse is still detained, questions can be transmitted through his attorney." Opp. at 16. Pursuant to the Protective Order entered in the habeas litigation, counsel are prohibited from transmitting press inquiries to detainees. See Supp. Hecker Decl. ¶ 14 & Exh. I. Accordingly, as to detainees who

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6 To the extent, as AP suggests, Opp. at 13-14, this Court previously ruled that the privacy interests of third parties are more attenuated, and therefore weaker, than the privacy interests of the detainees under Exemption 6, that reasoning should not be extended to the law enforcement records covered by Exemption 7(C), in which the privacy interests of third parties are well established.

remain in DOD custody, the purported public interest asserted by AP is conjectural at best.

As to detainees who have been released, moreover, the fact that AP intends to seek them out and question them, Opp. at 16, only heightens their privacy interest and tips the balance further against disclosure. See United States Dep't of State v. Ray, 502 U.S. 164, 177 (1991) (fact that requesters intended to interview Haitian returnees "magnifie[d] the importance of maintaining the confidentiality of their identities"). Thus, even assuming that the public interest protected by FOIA includes AP's derivative use of the withheld information for purposes of reporting a news story, given the significant information already publicly available, the fact that disclosure of the detainees' identities will not yield any additional information about alleged abuse if the detainees remain in custody, and the further invasion of privacy that AP intends to inflict if the detainees have been released, the detainees' privacy interests outweigh any public interest in disclosure, particularly under the less demanding standard of Exemption 7(C).

POINT III

DOD HAS PROPERLY WITHHELD, PURSUANT TO FOIA EXEMPTIONS 3 AND 6, THE NAMES AND ADDRESSES OF TWO DETAINEES' FAMILY MEMBERS CONTAINED IN RED CROSS MESSAGES

A. The Family Members' Identifying Information Is Exempt from Disclosure Under Exemption 3

Following DOD's production of the CSRT documents to AP on March 3, 2006, which production included personal correspondence transmitted between detainees and their family members by the ICRC, known as "Red Cross Messages," the ICRC formally requested that DOD refrain from publicly releasing such documents in the future. Supp. Hecker Decl. ¶ 4 & Exh. A. Pursuant to the ICRC's request, and the authority set forth in 10 U.S.C. § 130c, DOD invokes

Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), as an additional basis for withholding the personal correspondence submitted by two detainees to the ARBs. See Supp. Hecker Decl. ¶¶ 3-8 & Exhs. A-B.

DOD's assertion of Exemption 3 was triggered by the ICRC's written request for non-disclosure of Red Cross Messages dated March 10, 2006, Supp. Hecker Decl., Exh. A, and thus the Court should consider the applicability of Exemption 3 even though it was not asserted in DOD's initial moving papers. See, e.g., ACLU v. DOD, 389 F. Supp. 2d at 575 (considering applicability of FOIA exemption claimed for the first time after briefing and oral argument of summary judgment motion) (citing Nat'l Council of La Raza v. Dep't of Justice, 339 F. Supp. 2d 572, 573 (S.D.N.Y. 2004), and August v. FBI, 328 F.3d 697 (D.C. Cir. 2003)); Computer Profs. for Social Responsibility v. U.S. Secret Svc., 72 F.3d 897, 903 (D.C. Cir. 1996) (reversing district court's denial of Rule 60(b) motion to reconsider based upon Secret Service's new in camera declaration, and ruling that Exemptions 7(C) and 7(D) were properly invoked in light of new declaration, where Secret Service showed good faith and speed in bringing motion, and third-party interests were at stake).

Exemption 3 exempts from disclosure under FOIA "matters that are . . . specifically exempted from disclosure by statute . . . , provided that such statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, the Court must determine, first, whether the claimed statute is an exempting statute under FOIA, and, second, whether the withheld material satisfies the criteria of the exemption statute. Sims v. CIA, 471 U.S. 159, 167 (1985); A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 143 (2d Cir. 1994); Fitzgibbon v. CIA, 911 F.2d 755, 761 (D.C. Cir. 1990). "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of the withheld material within the statute's coverage." Fitzgibbon, 911 F.2d at 761-62 (citations and internal quotation marks omitted).

1. 10 U.S.C. § 130c Is an Exempting Statute

The exempting statute that applies to the Red Cross Messages is 10 U.S.C. § 130c, titled "Nondisclosure of information: certain sensitive information of foreign governments and international organizations." The ICRC qualifies as an "international organization" under Section 130c. See 10 U.S.C. § 130c(h)(3)(A) ("international organization" includes [a] public international organization designated pursuant to section 1 of the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288) as being entitled to enjoy the privileges, exemptions, and immunities provided in such Act"); 22 U.S.C. § 288f-3 (ICRC an "international organization for the purposes of this title"); Executive Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988) (extending ICRC "the privileges, exemptions, and immunities provided by the International Organizations Immunities Act).

Section 130c provides that the "national security official concerned . . . may withhold from public disclosure otherwise required by law sensitive information of foreign governments in accordance with this section." 10 U.S.C. § 130c(a). The statute further provides:

> (b) Information Eligible for Exemption. – For the purposes of this section, information is sensitive information of a foreign government only if the national security official concerned makes each of the following determinations with respect to the information:
>
> > (1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international

> organization.
>
> (2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).
>
> (3) That any of the following conditions are met:
>
> > (A) The foreign government or international organization requests, in writing, that the information be withheld.
> >
> > (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.
> >
> > (C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection [(g)] as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

10 U.S.C. § 130c(b). Section 130c thus "establishes particular criteria for withholding," 5 U.S.C. § 552(b)(3), and, accordingly, "constitutes an exempting statute for the purposes of FOIA Exemption 3." ACLU v. DOD, 389 F. Supp. 2d at 554.

2. The Red Cross Messages Satisfy the Criteria of 10 U.S.C. § 130c

a. The ICRC and Red Cross Messages

Under the 1949 Geneva Conventions, the ICRC has a unique role with regard to prisoners of war and other detainees held during armed conflict. Supp. Hecker Decl. ¶ 5. This role includes accounting for persons protected by the Geneva Conventions through collection of information reported to the ICRC by detaining powers; visiting places where such persons are detained, imprisoned or held pending transfer; privately interviewing such persons, and advising and reporting to governments engaged in hostilities on the condition of prisoners of war or detainees held by the various nations involved. Id. ¶ 5 & Exh. D. The Geneva Conventions also provide for the ICRC to fulfill the humanitarian role of facilitating communications between detained persons and their families. Id. ¶ 7. The ICRC's ability to have access to detainees and obtain information about them in a confidential setting is crucial to its ability to perform its role under the Geneva Conventions. Id. ¶ 5.

Commencing in 2002, DOD transferred enemy combatants captured abroad to the detention facility at Guantanamo. Id. ¶ 6. DOD subsequently granted the ICRC's request to visit the detainees, and the ICRC has since made regular visits to Guantanamo. Id. During its visits, the ICRC delegation meets privately with the detainees and provides them an opportunity to send correspondence to family members in the form of "Red Cross Messages" or "RCMs." Id. ¶ 7. This correspondence is written on pre-printed forms that contain the ICRC name. Id. & Exh. E. Each form includes the ICRC's restriction that the contents of the correspondence must be limited to "family news of a strictly personal nature." Id. The ICRC provides the RCMs to DOD for review to ensure that classified or other inappropriate information is not transmitted to or from the detainees. Id. ¶ 8. Following this review, the RCMs are returned to the ICRC, which then hand-delivers them to the addressees through the ICRC delegations, national Red Cross or Red Crescent societies around the world. Id. The neutrality of the ICRC allows these messages to be passed across borders and conflict front lines. Id.

b. The ICRC's Request for Nondisclosure of Red Cross Messages

On March 3, 2006, in accordance with the Court's Order dated February 22, 2006, DOD produced the CSRT transcripts and related documents to AP, with only the names of U.S.

Government personnel redacted. Supp. Hecker Decl. ¶ 3a. This production included unredacted copies of RCMs transmitted between the detainees and their family members by the ICRC. Id. Representatives of the ICRC first learned of the public release of RCMs on March 6, 2006. Id. ¶ 4 & Exh. A. Upon learning of this release, the ICRC contacted DOD and objected to the disclosure of RCMs. See id. ¶ 4. The ICRC subsequently submitted a formal written request that such letters not be disclosed in the future. Id. ¶ 4 & Exh. A. In its letter, the ICRC states:

> Having only recently learned that Red Cross Messages are included in the documents to be released by the Department of Defense, the [ICRC] wishes to state its objection to the public release of Red Cross Messages sent or received by internees who are or have been interned in Guantanamo Bay, Cuba. . . .
>
> The public release of information contained in the Red Cross Messages could impact on the internees concerned, their families and/or a third person. In particular, the ICRC is concerned that such public release could adversely impact the safety or security of persons whose names and/or personal information is contained in the messages. Additionally, the concerned persons should not be exposed to public curiosity, as provided under international humanitarian law. The ICRC believes that persons whose names and/or personal information would be revealed by such a release may have a legitimate privacy interest in opposing the release. The ICRC does not publicly disclose these messages.
>
> Consequently, unless the concerned internees have freely expressed their consent to the public release of Red Cross Messages sent or received by them, the ICRC opposes any such release and asks the Department of Defense to not publicly release these messages.

Id. Exh. A.

c. The Deputy Secretary of Defense's Determination

Pursuant to the determination of Deputy Secretary of Defense Gordon England, see Supp. Hecker Decl., Exh. B, the Red Cross Messages that DOD has withheld from production in this case satisfy all of the criteria of 10 U.S.C. § 130c. First, the RCMs were "provided by, otherwise made available by, or produced in cooperation with" the ICRC. See 10 U.S.C. § 130c(b)(1);

Supp. Hecker Decl. ¶¶ 3-8 & Exhs. A-B. Second, the ICRC itself withholds RCMs from public disclosure, as reflected by the ICRC's written representation to that effect. See 10 U.S.C. § 130c(b)(2); Supp. Hecker Decl. Exhs. A-B. Third, the ICRC has requested in writing that RCMs be withheld from public release. See 10 U.S.C. § 130c(b)(3)(A); Supp. Hecker Decl. Exhs. A-B. Through the determination of Deputy Secretary England, DOD has demonstrated that the Red Cross Messages withheld by DOD satisfy the criteria of 10 U.S.C. § 130c. The identifying information contained in the Red Cross Messages is therefore exempt from disclosure under Exemption 3.

B. The Family Members' Names and Addresses Are Exempt from Disclosure Under Exemption 6

DOD has also met demonstrated that disclosure of the names and addresses of family members contained in Red Cross Messages submitted by two detainees to the ARBs, particularly in light of those detainees' unfavorable testimony concerning the Taliban, would constitute a clearly unwarranted invasion of the family members' personal privacy under Exemption 6. Mem. at 27-29.[7] AP's claim that DOD must establish that "these particular detainee families would be put at risk of harm if their identities are disclosed," Opp. at 27, or provide "direct evidence of fear of harm," Opp. at 28, misstates DOD's burden under Exemption 6. See, e.g., Wood v. FBI, 432 F.3d 78, 88 (2d Cir. 2005) ("measurable privacy concern" exists where disclosure of identifying information "might," "may," or "could conceivably" subject government employees to embarrassment or harassment) (citing cases); Judicial Watch v. Reno, No. 00-0723 (JR), 2001 WL 1902811, at *8 (D.D.C. Mar. 30, 2001) (disclosure of asylum application "may very well endanger [the applicant's] life and the safety of other family members"). Moreover, even if a family member might have anticipated that a detainee would provide his or her letter to DOD in an effort to secure release from Guantanamo, but see Hecker Decl., Exh. 7 at 907 (noting that "[i]t is a big shame in our culture to read my wife's letter for you"), that does not suggest that the family member would have any reason to expect that the information would be provided to the Associated Press for worldwide publication. See Mem. at 28; Pendergrass v. U.S. Dep't of Justice, No. Civ. A. 04-112 (CKK), 2005 WL 1378724, at *4 (D.D.C. June 7, 2005) (tapes of telephone conversations between federal inmate and his counsel properly withheld; fact that counsel was aware of potential monitoring of calls by Bureau of Prisons "would not negate her privacy rights under FOIA").

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[7] Again, AP does not dispute that the withheld information constitutes "similar files" within the meaning of Exemption 6.

DOD has shown that the two detainees at issue provided testimony that could reasonably be perceived as hostile to the Taliban, and that there is no reason to believe that their family members would have expected their names and home addresses to be publicly disclosed simply because they sent RCMs to the detainees. Any generalized public interest in evaluating whether DOD "followed-up" on the detainees' claims of mistaken identity, Opp. at 29, does not outweigh the family members' privacy interests, particularly in light of the fact that the detainees' own statements and identifying information have now been produced.[8] Even putting aside any potential danger to the family members as a result of the detainees' testimony, they have cognizable privacy interests in not being confronted by AP or others seeking information about their relationship to, or connection with, individuals designated as enemy combatants. Ray, 502

[8] DOD produced more than 850 pages of ARB transcripts and related documents to AP on March 3, 2006, with only the names of U.S. Government personnel redacted. Supp. Hecker Decl. ¶ 3b.

U.S. at 177. This concern is exacerbated by the heightened press interest in this case. In the period leading up to the release of the unredacted CSRT documents on March 3, 2006, DOD received numerous press inquiries for copies of the documents being produced to AP, and thus determined that the records were required to be posted in DOD's electronic reading room, in accordance with the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (effective Mar. 31, 1997), codified at, 5 U.S.C. § 552(a)(2)(D), and DOD's implementing regulations. Supp. Hecker Decl. ¶¶ 11-12. Any subsequent releases to AP in this case are likely to be posted electronically for the same reasons. See id. ¶ 12.

The family members' strong privacy interests are further confirmed by the ICRC, which has formally requested that DOD not publicly release the Red Cross Messages. See Hecker Decl., Exh. A (ICRC letter to DOD noting that public release of RCMs "could adversely impact the safety or security of persons whose names and/or personal information is contained in the messages" and inappropriately expose them to "public curiosity," contrary to international humanitarian law). If the family members wish to speak to the press, they may do so, but to give AP and other news organizations their names and addresses would constitute a clearly unwarranted invasion of their personal privacy.

POINT IV

DOD HAS PROPERLY WITHHELD IDENTIFYING INFORMATION FROM THE TRANSFER AND RELEASE DOCUMENTS PURSUANT TO FOIA EXEMPTION 5[9]

A. The Withheld Information Is Predecisional and Deliberative

In its moving papers, DOD set forth in detail the agency's process for determining whether detainees will be transferred from Guantanamo, which involves at least four distinct steps: (1) a recommendation by the ARB, (2) an initial determination by the DCO that a detainee should be transferred, (3) a diplomatic process involving the Department of State and the receiving country by which information is sought regarding what measures the receiving country is likely to take to ensure that the detainee will not pose a threat to the United States or its allies upon release or transfer and, as appropriate, transfer assurances, including assurances that the detainee will be treated humanely, and (4) if the diplomatic process is successfully completed, the ultimate decision to transfer the detainee from Guantanamo. Mem. at 30-31; Hecker Decl. ¶¶ 3g-n, 16 & Exhs. 4-5. AP nonetheless claims that DOD's decision to transfer is "final" at Step 2, when the DCO makes the initial transfer determination as reflected in an action memorandum, and simply ignores Steps 3 and 4. See Opp. at 22 ("The details of this later process, as set forth in the Hecker Declaration and the Declarations of Matthew Waxman and Pierre-Richard Prosper, are beside the point."). AP's position is inconsistent with the undisputed facts and the governing law.

While it is true that a document is not necessarily predecisional just because further steps are needed to implement a decision, or because the decisionmaker could change his mind, Opp. at 22-24, where a decision is contingent upon future events that may or may not occur, then it cannot be said to be final. See, e.g., Dipace v. Goord, 218 F.R.D. 399, 405 (S.D.N.Y. 2003) (letter from head of state agency to head of another state agency proposing to adopt a particular policy initiative deemed predecisional, where agency policy was not "finally effectuated at the time the letter was written," and proposal in letter was "subsequently rejected and never ultimately adopted"); Heggestad v. U.S. Dep't of Justice, 182 F. Supp. 2d 1, 8-9 (D.D.C. 2000) (prosecution memoranda predecisional "because a decision was subsequently made to prosecute and the prosecution did in fact occur").[10] AP does not – and cannot – dispute that the Hecker, Waxman, and Prosper Declarations accurately describe the process by which the DCO decides to transfer a detainee from Guantanamo, nor that all four steps of this process must be successfully

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[9] In addition to detainee identifying information, DOD also withheld other deliberative material, such as the recommendations of the ARB panel and ARB legal advisor, under Exemption 5. Hecker Decl. ¶ 5f n.6. AP has advised that it does not contest these withholdings. Normand Decl. ¶ 5; Supp. Normand Decl. ¶ 4.

[10] By contrast, the cases on which AP relies, Opp. at 22-23, involved broad agency policy or legal determinations that were not conditioned upon future decisions or events, although they may have required implementation in individual cases. For example, Tax Analysts v. Internal Revenue Service, 294 F.3d 71, 81-82 (D.C. Cir. 2002), Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 617 (D.C. Cir. 1997), Taxation With Representation Fund v. Internal Revenue Service, 646 F.2d 666, 681-83 (D.C. Cir. 1981), and Evans v. United States Office of Management and Budget, 276 F. Supp. 2d 34, 39-41 (D.D.C. 2003), all involved legal opinions or similar documents that were widely disseminated within the respective agencies and relied upon as agency "working law." See also Heggestad, 182 F. Supp. at 9 (distinguishing Taxation With Representation Fund as involving "the policy-making function of the agency, not the internal decision-making process of an agency regarding a specific criminal prosecution," and noting that the documents at issue in Taxation With Representation Fund were final opinions and decisions, many of which had been indexed, published internally, and relied upon by agency for future decisions). The court in Taxation With Representation Fund, moreover, expressly limited its decision to documents that were "revised to reflect the final position" of the agency, which excluded documents (like the action memoranda in this case) that had not yet been "approved." 646 F.2d at 681.

accomplished before a detainee will in fact be transferred.[11] The diplomatic process is an integral part of the decision whether (or not) to transfer a detainee, and the transfer will not take place if that process is not successfully concluded. Hecker Decl. ¶¶ 5j, 5l, 16c(1) & Exh. 4 ¶ 7 & Exh. 5 ¶ 8. In addition, the DCO consults with other agencies before reaching a final decision to transfer a detainee. Hecker Decl. ¶ 3j; see also Supp. Hecker Decl. ¶ 10 (noting that, despite initial determination that detainee should be transferred, DCO subsequently determined, as a result of inter-agency consultations, that detainee should continue to be detained). Thus, AP's contention that "[w]hile the DCO's decision may precede the ultimate decision on how to release or transfer a detainee, it does not precede the decision to act," Opp. at 23, is simply incorrect. There is no "decision to act" until the diplomatic and inter-agency consultation process is completed. Under these circumstances, the DCO's initial determination that the detainee should be transferred is clearly predecisional.

The DCO's initial determination is also deliberative, as it plays a critical role in the process by which the ultimate transfer decision is made. See Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350, 356 (2d Cir. 2005) (document considered "deliberative" if it is "actually related to the process by which policies are formulated." (citation, alteration and internal quotation marks omitted)). Contrary to AP's claim, Opp. at 24, the identifying information withheld under the deliberative process privilege is not "purely factual." Release of the information would reveal not only the detainees' identities, but also that DOD is considering transferring them from Guantanamo. The detainees' identifying information is therefore inextricably intertwined with DOD's ongoing process of deciding whether or not to transfer the detainees.[12]

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[11] AP points out that the September 14, 2004 Memorandum describing implementation of the ARB procedures for enemy combatants detained at Guantanamo, which was issued before the ARBs began in December 2004, Hecker Decl. ¶ 4a, states that "[t]he DCO decides whether to release, transfer with conditions, or continue to detain the enemy combatant," and the "[t]he DCO will notify the Secretary of Defense of his decision and coordinate within DoD and with the [Department of State] (if necessary) to implement any combatant release or transfer according to established Deputy Secretary of Defense policy." Hecker Decl., Exh. 1, Encl. 4 ¶ 5c-d. But the fact that the DCO makes a "decision" about transfer does not make that decision final, if in fact it is contingent upon the subsequent "coordinat[ion]" and "implement[ation]."

AP's claim that there is no "evidence that the decision making process would be inhibited by the release of detainee names," Opp. at 24, is also wrong. DOD has produced ample evidence, which AP fails even to address, Opp. at 25 & n.11, that disclosure of this information before completion of the diplomatic process would make it more difficult, if not impossible, to effectuate the detainee's transfer, and would adversely impact diplomatic relations and DOD's ability to maintain security at Guantanamo. Mem. at 31, 33-34; Hecker Decl. ¶¶ 5l-m, 16c(1) & Exh. 4 ¶ 8 & Exh. 5 ¶¶ 9-12. AP acknowledges that one of the purposes of the deliberative process privilege is to "protect against premature disclosure of proposed policies before they have been finally formulated and adopted." Opp. at 18 (citation and internal quotation marks omitted). Given that the ultimate transfer decision is dependent upon the outcome of the diplomatic process, and thus the transfer may not occur at all, disclosure of detainee identifying information prior to transfer would cause the very sort of harm that the deliberative process is intended to prevent.

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[12] AP's arguments based upon other supposed "hallmarks" of the deliberative process privilege, Opp. at 24-25, are without merit. That the DCO has final decisionmaking authority regarding transfers does not mean that his initial, conditional decision is final. See, e.g., Judicial Watch of Fl. V. U.S. Dep't of Justice, 102 F. Supp. 2d 6, 14 (D.D.C. 2000) (privilege protects "documents which the agency decisionmaker herself prepared as part of her deliberation and decisionmaking process"). That the DCO's action memorandum is supposedly initialed in a "declaratory" manner and transmitted "horizontally" to the Department of State also fail to defeat the privilege, given that the DCO's decision is ultimately contingent upon the accomplishment of the diplomatic process.

B. The Withheld Information Should Not Be Available In Litigation with DOD

AP does not meaningfully address DOD's separate argument that detainee identifying information in the transfer documents was properly withheld under Exemption 5 because, apart from the deliberative process privilege, such information should not be "available by law . . . in litigation with the agency," 5 U.S.C. § 552(b)(5), because it would infringe upon the President's ability to transfer wartime detainees. Mem. at 33-34; Hecker Decl. ¶¶ 5l, 16c(1) (United States' ability to seek and obtain transfer assurances from foreign governments would be adversely affected by public release of DCO's transfer decisions prior to completion of diplomatic discussions); id. Exh. 4 ¶ 8 (requiring United States to unilaterally disclose information about proposed transfers could adversely affect relationship of United States with other countries and impede our country's ability to obtain vital cooperation from concerned governments with respect to military, law enforcement, and intelligence efforts). The Government has vigorously resisted the disclosure of such information in the habeas cases, contending, inter alia, that it was inappropriate for the judicial branch to issue orders that impede the ability of the Executive to effectuate the removal of detainees from Guantanamo. Hecker Decl. ¶ 16c(2). Several courts have accepted the Government's arguments; those courts that have not have been appealed (and release of transfer information in this case could effectively moot those appeals, at least in part); and in no case has a court ordered disclosure of transfer information prior to the accomplishment of the diplomatic process. See id. For this additional reason, therefore, the withheld information should not be available to a party in litigation with the agency, and was properly withheld under

Exemption 5.[13]

CONCLUSION

For the foregoing reasons, and the reasons set forth in DOD's opening memorandum of law, the Court should grant DOD's motion for summary judgment and deny AP's cross-motion for summary judgment.

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Respectfully submitted,

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[13] This detainee identifying information in the transfer documents is also protected from disclosure under Exemption 6, for the reasons stated in DOD's opening brief. Mem. at 34.